Supreme Court, U.S.
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No. 97-425

IN THE

# Supreme Court of the United States

October Term, 1996

WESLEY K. BELL t/a WES OUTDOOR ADVERTISING CO.,
*Petitioner,*

vs.

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

May the State of New Jersey, consistently with the First and Fourteenth Amendments to the United States Constitution, do the following?

A. Regulate private property through its Wetlands Act to prevent a property owner from his use of the property by erecting Billboards thereon when the land has no use on it whatsoever, and in doing so the regulation is being done without compensation?

B. Arbitrarily produce maps as evidence at trial without notice to plaintiff, then agree on the record (when required by the judge) to supply plaintiff with the photographic copies, and then not produce them over plaintiff's objections, and then have the trial court base its decision on that evidence, then uphold that decision on appeal over plaintiff's objections without mention of the State's improper trial conduct?

C. Deny by silence in the opinions, plaintiff's claims for Un-Constitutional taking violations?

D. Shield the State's employees from damage claims for the taking of petitioner's lands through wetland and wrongful acts administered through their public employees and department filled positions?

E. Delay plaintiff's appeal process by destroying or making the file unavailable when the process was properly filed with the agency and stamped "received"?

F. Delaying plaintiff's Appeal Process in 1990 by withholding publication of the denial in the "DEP BULLETIN" a state publication which begins the time for appeal purposes?

G. Cause plaintiff to go through extensive expenses and application procedures on June 30th—1989 for the erection of Billboards on wetland and adjacent to wetlands when the agency had no intention of approving them?

H. Improperly hold that the case *Bell v. Stafford*, 110 N.J. 384, 541 A.2d 692 (N.J. 1988) did not deal with the shifting of the burden of proof (for this plaintiff) in the regulation of Billboards, and then hold this plaintiff must bear the burden of proof on this application in violation of the United States Constitution?

I. Permit the Chief Justice of the Supreme Court of New Jersey to sit in on this appeal in violation of Rule 1:12-1(c) and CANNON 3, C.(1)(a)(b), (d)-(i). which prohibits her participation since she was Attorney General for New Jersey and was the Attorney of Record?

## LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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Wesley K. Bell trading as WES OUTDOOR ADVERTISING CO. petitions the Court for a Writ of Certiorari to review the Judgment of the Supreme Court of New Jersey.

## THE QUESTIONS PRESENTED ARE SUBSTANTIAL

### INTRODUCTION

The issues raised by this appeal are substantial, as it is suggested, at the outset, by the method that the Trial Court and the Administrative Law Court refused to decide or hold the Constitutional precedence on the issues raised.

The Appeals Court and Supreme Court of New Jersey sidestepped these same issues and thereby refused to implement the controlling case law that they are required to follow, already held by this and other high courts.

### OPINIONS BELOW

The Surpeme Court of New Jersey denied Certification on June 4, 1997 on appeal from the Decision of the Appellate Division of the Superior Court of New Jersey which issued its opinion on March 17, 1997 and is contained in the Appendix at A3.

The original Decision from the Office of Administrative Law dated June 7, 1994 is contained in the Appendix at A12.

The Final Decision of the Commissioner of the Department of Environmental Protection, Dated August 31, 1994 is contained in the Appendix at A8.

## JURISDICTION

The subject of this case is the Constitutionality of the New Jersey Wetlands Act and its enforcement by State officials and employees as applied, which totally eliminates and destroys the use of private property without compensation.

The Supreme Court of New Jersey in denying Certification, actually upholds the State's indiscriminate use of its Police Powers against one individual while not applying the same set of standards to another.

Jurisdiction of this Court to review the final judgment of the Supreme Court of New Jersey is conferred by 28 U.S.C. 1257(2) (1976).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

Relevant portions of the First, Fifth, Thirteenth and Fourteenth Amendments of the United States Constitution and portions of the New Jersey Wetlands Act and its enforcement thereof, are set forth in the Appendix at A35.

## STATEMENT OF THE CASE

This appeal is from a decision issued from the Office of Administrative Law dated June 7, 1994 and an Order upholding that decision issued by the Commissioner dated August 31, 1994.

These Orders denied the use of plaintiff's lands in Atlantic County for Billboard construction in spite of an application #89-0728-2 filed on June 30, 1989 which allowed defendants an opportunity to select between two methods of construction; (1) one which would involve installing support piling within and outside of the wetland areas and the other (2) in which the supports of the Billboard would be totally on upland areas with only a portion of the Billboard overhanging the wetlands.

Plaintiff's lands have no other use or improvements thereon and defendants, through Regulations without specific standards, have caused this plaintiff to expend excessive amounts of monies and time going through a wetland process that the New Jersey Department of Environmental Protection has no intention of approving.

The New Jersey Wetland process has no set of standards to guide an applicant when seeking a Billboard approval and the process is being used by the State to discourage any attempt to get an approval.

The defendants' employees and department heads hold an obvious dislike for plaintiff Bell because of his continued efforts to use other wetlands in New Jersey.

One specific occurrence is the matter entitled *Wesley K. Bell v. State of New Jersey, et al.*, which is presently pending before this court, under Docket 97-168.

In the present matter in Atlantic County (this appeal) the defendants have caused plaintiff's lands to be "taken by regulatory measures, in violation of both the Constitution and the United States Constitution."

## PROCEDURAL HISTORY

Plaintiff purchased this property (lot 17, Block 225) in the City of Abescon, New Jersey at public auction on June 17, 1986 from the County of Atlantic and took title on August 8, 1986.

On July 3, 1986, plaintiff Bell filed an application #54172 with the New Jersey Department of Transportation for a permit to erect a set of Billboards on this tract of land.

On December 23, 1986, the Department of Transportation sent Bell a letter stating that he would need a permit or release form D.E.P. under the Wetlands Act before the D.O.T. Permit could be issued.

Bell requested an Informal Hearing with the N.J.D.O.T. and May 18, 1988 he filed Application #CENAP-OP-R-88-1125 (NJD) with the U.S. Army Corps of Engineers to construct his Billboards, and on March 31, 1989, the Agency issued a written approval (App. A33).

On June 30, 1989 plaintiff filed a Wetlands Application #89-0728-2 with the New Jersey Department of Environmental Protection.

In an undated letter form N.J.D.E.P. postmarked September 27, 1989, defendants demanded additional information.

On December 15, 1989, plaintiffs' Engineer Ponnoni Associates submitted the additional information requested.

Defendants N.J.D.E.P. sent a letter of denial, backdated to March 15, 1990 in an envelope postmarked March 21, 1990.

On May 11, 1990 after repeated phone calls to the N.J.D.E.P., plaintiff Bell wrote a letter and sent it by Certified Mail to the Commissioner of D.E.P. which letter requested the D.E.P. Bulletin publication date to appeal from and also expressed the problems being caused by the agency's failure to grant an informal meeting that is provided by the Regulations.

On June 21, 1990, plaintiff again telephoned the defendants requesting the publication date of defendants' denial for purposes of appeal.

Defendants N.J.D.E.P. sent an "undated letter, postmarked June 27, 1990 stating the denial would be published in the N.J.D.E.P. Bulletin on July 11, 1990 at which time plaintiff Bell could file his appeal to the office of Administrative Law. However, the Notice of Denial has never been published to this date.

Plaintiff Bell being frustrated at this point hired Hazel Gluck, former N.J.D.O.T. Commissioner and her present agency of Public Policy Advisors, Inc., to investigate this matter on behalf of Bell.

Public Policy Advisors, Inc., served the N.J.D.E.P. (time stamped June 14, 1991) another letter of Bell's, dated June 12, 1991 along with a complete set of the filed application (now declared missing from N.J.D.E.P. records) since the N.J.D.E.P. Commissioner advised Ms. Gluck that they could not locate the application or the file related thereto.

After additional repeated phone calls to the Commissioner's Office, Bell wrote a letter dated June 17, 1991 and hand delivered it to the Commissioner's Office with demands for automatic approval on June 25, 1991.

On August 26, 1991, the defendants N.J.D.E.P. sent Bell a letter stating that the denial was not published, but they would consider Bell's letters of May 11 and June 12 as an appeal to Administrative Law.

The N.J.D.E.P. then supplied Bell with a check list for appeal which was then filed by fax on September 13, 1991.

Thereafter because of the N.J.D.E.P.'s inaction, Bell wrote another letter on February 7, 1992 to put additional pressure on the agency to perform its duties. On March 3, 1992, the N.J.D.E.P. sent a letter stating application was being transferred to the Office of Administrative Law.

Finally on March 9 and 10, 1994, this matter was heard before the Office of Administrative Law and on June 7, 1994, an opinion was issued (App. A12) and the Commissioner extended for 45 days to September 6, 1994 (App. A11).

Plaintiff filed Exceptions timely on August 4, 1994 and the Commissioner upheld the decision on August 31, 1994 (App. A9) and a Notice of Appeal was filed on September 16, 1994.

## REASONS FOR GRANTING THE WRIT

### POINT I

**The Wetlands Act Is An Unconstitutional Regulatory Taking Of Private Property As Applied By The New Jersey Department Of Environmental Protection.**

In this case the Wetlands Act as enforced against Bell on these properties is an unconstitutional application of law, is a regulatory taking without compensation and violates the First, Fifth, Thirteenth and Fourteenth Amendments of the United States Constitution and also violates the New Jersey Constitution as well as Article Three, section two of the U.S. Constitution and Title 42 of the U.S. Code, sections 1983, 1985 (3) and 1986.

In this case before this court the N.J.D.E.P. has denied Bell of the only possible use of his Wetlands Properties in which there would be no adverse or detrimental effects on the wetlands or the environment.

There are overriding federal and state policies favoring protection of coastal area. Nevertheless, in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) the court states that . . .

> "when the character of the government action is a permanent physical occupation of the property, our cases uniformly have found a taking to the extent of the occupation without regard to whether the action achieves an important public benefit or has only a minimal economic impact on the owner" citing 458 U.S. at 434-35.

In *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 2892 (1992) the court held . . .

> "While property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking".

In *Kohl Indust. Park Co. v. County of Rockland*, 710 F.2d 895, 900 (2nd Cir. 1983) the court said . . .

> "the limits of police power may be extensive, although ill-denied, but common justice requires that such power should not be used to circumvent the constitution inhibition against appropriating private property for a public use without compensation".

The most recent controlling case law to become final on these wetland and regulatory taking issues is the Federal Circuit Court's decision issued June 15th 1994 in *Loveladies v. United States*, 28 Fed. 3d. 1171 (Fed.Cir. 1994).

On February 1st 1995 the United States Attorney General abandoned their appeal of this case to the U.S. Supreme Court.

The *Loveladies* holding is now the controlling case law for New Jersey and the Nation.

In *Loveladies Harbor Inc. v. The United States*, 21 Cl. Ct. 153 (1990) which has been upheld by the United States Court of Appeals, Federal Circuit on June 15th 1994, *supra*

> The U.S. Claims Court held that . . . "The determination governmental action constitutes a taking is, in essence a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest (citing *Agins*, 447 U.S. at 260-61).

At page 7 the *Loveladies* case relied on the following new three point standard for regulatory takings . . .

"With regard to the interest alleged to be taken, there has been a regulatory taking if . . .

(1) There was a denial of economically viable use of the property as a result of the regulatory imposition;

(2) The property owner had distinct investment backed expectations; and

(3) It was an interest vested in the owner, as a matter of state property law, and not within the power of the state to regulate under common law nuisance doctrine.

The current case law holding for Regulatory Takings by means of Wetland Regulations of private property was addressed by the Federal Circuit in *Loveladies* (*supra*) at page 5, line 48 to page 6, line 6 . . .

"This question was finally definitively answered by the Court, after a number of false starts (FN10) in *First English Lutheran Church v. Los Angeles County,* 482 U.S. 304 (1987). The Constitution, said the Court, requires just compensation for a regulatory taking from the date it occurs until the date of the regulation's recission or amendment. A simple post hoc declaration of invalidity did not provide the remedy the constitution mandated. *Id.* at 319. see also *Yuba Natural Resources Inc. v. United States,* 821 F.2d 638 (Fed. Cir. 1987).

The Supreme Court of the United States has held in *Lucus v. South Carolina Coastal Commission,* 505 U.S. _____, 112 S.Ct. 2886 (1992) . . .

"The ban on construction deprived him of all 'economically viable use' of his property and therefore effected a 'taking' under the Fifth and Fourteenth Amendments that required the payment of just compensation" citing *Agins v. Tiburon,* 447 U.S. 255, 261.

In *Lucas v. South Carolina* (*supra*) the Supreme Court held . . .

> "a state may not transform private property into public property without compensation . . . citing *Webb's Fabulous Pharmacies Inc. v. Beckwith*, 449 U.S. 155, 164 (1980).

Defendants have denied Petitioner Bell all practical use of his lands without compensation for their regulatory scheme which exceeds the authority granted them by the legislature under the Wetlands Act *N.J.S.A.* 13:9 A-1 *et seq.*

## POINT II

**The Wetlands Act Forecloses Billboards, A Medium Of Communication Entering The Coastal Resorts Of South Jersey If They Are Not Already In Existence Prior To The Enactment Of The Wetlands Act.**

The Wetlands Act as selectively enforced forecloses and prohibits Billboards from being constructed on the Wetlands in New Jersey and therefore forecloses an entire media from reaching the traveling public into South Jersey's Resort areas.

The New Jersey Department of Environmental Protection has gone far beyond an authorization of a Statute or Constitutional Protections in Bell's Wetland Application, and a case on point of controlling effect was decided by the Fourth Circuit on July 5, 1995 in *11126 Baltimore Boulevard, Inc. v. County Md.*, Docket 93-2151 in which the court held . . .

> "Adult bookstore ordinance imposes unconstitutional prior restraint on speech because it fails to provide adequate procedural safeguards. Adult bookstore that special exception would face

> an eight-month delay from the date the application is filed to judicial resolution of denial of application."

In the present case Bell purchased his land on June 17, 1986 and began the application process to use his lands; over nine years later he still does not have a judicial resolution to enable to use his lands.

It will be over a decade before any court issues a decision in this matter and by that time the applicant Bell will be over sixty years of age, resulting in a short term use of his lands before he retires.

In *City of Ladue v. Gilleo* (decided June 13, 1994) the Supreme Court of the United States held at page 12, line 22 . . .

> "Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to freedom of speech is readily apparent—by eliminating a common means of speaking, such measures can supress too much speech." (Citing *Stone. Content-Neutral Restrictions,* 54 U.Chi.L.Rev. 46, 57-58 (1957) The Court long has recognized that by limiting the availability of particular means of communication, content-neutral restrictions can significantly impair the ability to individuals to communicate their views to others .... to ensure the widest possible dissemination of information *Assoc. Press v. U.S.,* 326 U.S. 354 US. 476, 484 (1957).

## POINT III

**N.J.D.E.P. Regulation Requiring Alternative Sites Is Inapplicable To A Property Owner Or A First Amendment Activity On Wetlands.**

The A.L.J. upheld the N.J.D.E.P.'s position in this case that Bell (the property owner) must seek and choose alternative upland Billboard Sites because his property is regulated as wetlands, is unconstitutional because of that position, and controlling case law clearly provides that First Amendment Activities (Billboard Advertising in this case) cannot be forced to find somplace else to speak.

## POINT IV

**Bell Is A Recognized First Amendment Activity By This Court And The New Jersey Supreme Court And Has The Standing To Invoke Issue.**

On point—In *Bell v. Stafford*, 110 N.J. 384, 395, 541 A.2d 692 (N.J. 1988) the court held . . .

> "Plaintiff (WESLEY K. BELL trading as Wes Outdoor Advertising Co.) had a standing to press the Constitutional challenge."

Another controlling case for First Amendment Activity is as follows at 58 F.2d 988 (4th Cir. 1995):

> "Fourth Circuit.—***11126 Baltimore Boulevard, Inc. v. County, MD.,*** **reversed. Adult bookstore ordinance imposes unconstitutional prior restraint on speech because it fails to provide adequate procedural safeguards. Adult bookstore that seeks special exception would face an eight-month delay from the date the application is filed to judicial resolution of denial of application."**

In the present case before this court, Bell purchased his land on June 17, 1986, now over eleven years later he is getting to his last step of resolution (the United States Supreme Court). The Office of Administrative Law does not grant an avenue of relief, but only sets up a record for appeal because any decision by the A.L.J. is subject to amendment or rejection by the Commissioner of N.J.D.E.P., the same person (or office holder) that withheld this appeal for years from resolution.

The Commissioner himself does not prepare his Order of rejection or upholding—the A.L.J. relies on his Deputy Attorney Generals working under him to prepare the Order which he merely signs his name to.

The Administrative Law Judge holds only a title while effecting the State Agency's positions while ignoring all controlling case law that is generally expected to guide his or her decision-making process, which is subjected to the Commissioner's alterations.

The Commissioners of any State Agency are not required to be an attorney at law and therefore are not capable of interpreting or revising any decision based on legal criteria.

Plaintiff is now 60 years of age, and if the N.J.D.E.P. has their way, Bell will still be waiting for his Billboard Approval when he files his application for Social Security.

The Constitutional protections do not validly permit the State of New Jersey or its agencies to procrastinate like they have in this case to Bell or any other of its citizens.

## POINT V

**The Burden Of Proof Shifts In This Case For Bell To Obtain Approval To Build His Billboard Here.**

The Burden of Proof clearly shifts in this case against the State of New Jersey and the holding by the A.L.J. that the burden of proof is on the applicant is in direct contradiction of controlling case law holding in *Bell v. Stafford, supra* and *Metromedia, Inc. v. San Diego,* 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981) *Central Hudson Gas & Elect. Corp. v. Public Serv. Comm'n,* 447 U.S. 557, 563-66, 100 S.Ct. 2343, 65 L.Ed.2d 341, 349-51 (1980).

## POINT VI

**Damages Should Flow To Appellant For Regulatory Taking Of Appellant's Lands By The N.J.D.E.P.**

In this case the N.J.D.E.P. has taken plaintiff's lands through regulation without compensation and this court should remand to Superior Court, Law Division of Atlantic County for a trial on the merits for loss of Billboard revenues, Legal Fees, Engineering Expenses and other expenses including but not limited to damages against those individuals who have violated Bell's Constitutional Protections.

Plaintiff Bell is entitled to Civil Rights damages in this case for use in a jury trial against those individuals responsible for the "wrongful" act of withholding the procedural process and approvals in this matter.

> See *Earl v. Winne,* 14 N.J. 119 at page 134. The New Jersey Supreme Court held, "If the presumption is overcome by convincing proof that they acted in excess of and distinct from their required official duty for personal reasons of their own, then for such acts they are civilly liable."

## POINT VII

**Malicious Abuse Of Process Is Evident In This Case And The Court Should Interpret Agencies Conduct As Abusive.**

Virginia Kopkash, the State's leading witness in this case advised Bell in the presence of others in the waiting room of the Pinelands Chiropractic Center at 125 East Main Street, Tuckerton, New Jersey, in August 1994 that "That people in her office had it in for (BELL) and that it was not her idea or desire to deny (BELL) the use of his land by denying his wetland approval, and that she was sorry that they made her take the positions at the hearings."

Plaintiff recognizes and this court should take judicial notice that the on-going wetland litigation between these same parties in *Lincoln Property Co. No. 70 v. Wesley K. Bell v. State of New Jersey, Department of Environmental Protection and the Township of Stafford,* Docket 97-168 has caused bitter feelings between the parties and has motivated the N.J.D.E.P. to unfairly and unequally deny plaintiff's applications as well as to delay by destroying or making unavailable agency records of this application.

## POINT VIII

**The New Jersey Department Of Environmental Protection Has Been Applying Its Regulations In An Unequal Fashion.**

The N.J.D.E.P. has approved many other Billboards on the wetlands and overhanging the wetlands on the Atlantic City Expressway both within the right-of-way and adjacent to the right-of-way for competitive Outdoor Advertising firms while defending this denial to Bell without justification of explanation.

The N.J.D.E.P. has refused to answer questioning on these issues and has withheld information on the introduction and presentation during the hearings while presenting evidence for their position on alternative upland sites when in fact these sites are not actually upland.

By the witholding of this information plaintiff was prevented from Due Process of Law and enabled the State to get past another year of Regulatory Taking of plaintiff's land.

## POINT IX

**The Administrative Law Judge Relied On Improper Evidence And Testimony By The State That Was Both Concealed From Advance Notice And Withheld To Present.**

The N.J.D.E.P. introduced maps, and aerial photographs into evidence (R-2) on March 10, 1994 (T.P. 489 L. 19 to P. 51 L. 21).

The State had not given plaintiff a copy of the maps or documents before or after the hearings, resulting in (surprise) and inability of plaintiff to properly object to their introduction or argue their content during the hearings or in this appeal.

The Deputy Attorney General agreed on the record that they would provide a true copy to Bell which has never been done in spite of repeated demands for them.

The State also used other photographs and documents in the hearings and never supplied any copies to plaintiff before or after the hearings.

Deputy Attorney General Barbara L. Conklin did not even file her *Statement of Items Comprising Record on Appeal* until September 20, 1995 of which she served Bell a copy by Fed-X on 9-21-95.

## POINT X

**Fundamental Fairness Is Required By Rules Of The Court, Case Law And The Due Process Clause Of The Constitution.**

Fundamental Fairness and the Rules of the Court and the Due Process Clause of the Constitution require advance notice and at the very least, copies after the hearings for appeal purposes.

The State of New Jersey in this case has unfairly and corruptly withheld their approval of this applicant, concealed evidence before and after its introduction and then withheld the statement of items comprising the Record on Appeal to their latest possible time.

## POINT XI

**Chief Justice Poritz Was Required To Step Down In This Matter As The Former Attorney General Responsible For The Prosecution Of This Case As The Attorney Of Record.**

The New Jersey Court Rule 1:12-1(c) and Cannon 3, C.(1), (b), (d)-(i), *requires* that the Chief Justice *must* step down in this case as the former Attorney General in charge of its prosecution.

## POINT XII

**The D.O.T. Regulations And The Office Of Administrative Law's Enforcement Of Those Regulations, Violate The First Amendment Of The United States Constitution.**

The Office of Administrative Law cannot meet its United States Constitutional Review Standards on Billboard (First Amendment) Applications and therefore it is required by law, that the Commissioner of Transportation or the Legislature must provide another method of the Appeal Process.

In *11126 Baltimore v. Prince George's County, Md.*, 58 F.3d 988 (4th Cir. 1995), the court held:

> "In a controlling First Amendment case the Court applied the **Freedman's** standards that:
> (1) any restraint prior to Judicial review can be imposed only for a specified brief period during which status quo must be maintained and,
> (2) expeditious judicial review of that decision must be available, and
> (3) the censor (State, in this case) must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court."

The court also cited, at page 1001, that in:

> "*Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70, 83 S.Ct. 631, 9 L.Ed.2d 584 (1993) noting that prior restraint on speech 'tolerated . . . only where it . . . assured an almost immediate judicial determination of the validity of the restraint.") *Redner v. Dean* @ (F.3d 1495, 1501-02 11th Cir. 1994) holding that prompt judicial review is never available when judicial review may not be sought until exhaustion of administration remedies under a scheme that fails to provide time restraints for administrative decision) cert. denied, _____ U.S. _____, 115 S.Ct. 1697, 131 L.Ed.2d 560 (1995) c/*East Brooks Books*

*Inc. v. City of Memphis*, 48 F. 3d 220, 225 (6th Cir. 1995) indicating that potential dely of 5 months is impermissible.

In *Richard J. Elrod v. John Burns*, 96 S.Ct. 2673 (1976) the court held:

> "Loss of First Amendment Freedoms, even for minimal periods of time, unquestionably constitute irreparable injury" (Per Mr. Justice Brennon, with two Justices joining and two Justices concurring in result.)

In *11126 Baltimore v. Prince Georges County Md.*, 58 F.3d 988 (4th Cir. 1995) the court held . . .

> "In a controlling 1st Amendment case the Court applied the *Freedman* standards that . . .
>
> (1) any restraint prior to Judicial review can be imposed *only* for a specified brief period during which status quo must be maintained and,
>
> (2) expeditious judicial review of that decision must be available, and,
>
> (3) the censor (STATE IN THIS CASE) must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.
>
> where it . . . assured an almost immediate judicial determination of the validity of the restraint". *Redner v. Dean*, @ (F.3d 1495, 1501-02, 11th Cir. 1994) holding that prompt judicial review is never available when judicial reviews may not be sought until exhaustion of administration remedies under a scheme that fails to provide time restraints for administrative decision, cert. denied, _____ U.S. _____, 115 S.Ct. 1697, 131 L. Ed. 2d 560 (1995) c/. *East Brooks Books Inc. v. City of Memphis*, 48 F.3d. 220, 225 (6th Cir. 1995) indicating that potential delay of 5 months is impermissible.

In *Richard J. Elrod v. John Burns*, 96 S. Ct. 2673 (1976) the Court held . . .

> "Loss of First Amendment Freedoms, even for minimal periods of time, unquestionably constitute irreparable injury" (Per Mr. Justice Brennon, with two Justices joining and two Justices concurring in result.)

Additional case law just decided that has a direct controlling effect in this case is as follows . . .

"*44 Liquormart Inc. v. Rhode Island*, U.S. Sup. Ct. 116 S.Ct. 1495 (1966) the court held . . .

> 'blanket bans' on commercial speech are reviewed with special care under *Central Hudson Gas & Electric Corp.* (citations omitted) and that regulation of truthful, nonmisleading commercial speech is subject to the same rigorous scrutiny as restrictions are other speech."
>
> "held that the ban fails the Fourth prong because it is broader than necessary".
>
> "In evaluating the ban's effectiveness in advancing the State's Interest, we note that a commercial speech regulation 'may not be sustained if it provides only ineffective or remote support for the Govt.'s purpose' " (citing *Central Hudson*).
>
> "For that reason, the State bears the burden of showing not merely that its regulation will advance its' interest, but also that it will do so to a material degree."
>
> "Although we do not dispute the proposition that greater powers include lesser ones, we fail to see how that syllogism requires the conclusion that the State's power to regulate commercial activity is 'greater' than its' power to ban Truthful, nonmisleading commercial speech."

In the present case the burden of proof has been WRONGLY placed on the Petitioner instead of the State of New Jersey in spite of holdings in this field, see *Bell v. Stafford*, 110 N.J. 384 and *Central Hudson Gas & Electric Corp. v. Public Service Comm'n.*, 447 U.S. 557, 563-66, 100 S.Ct. 2343, 65 L.Ed.2d 341, 349-51 (1980).

## CONCLUSION

It is requested that this court grant Certification on these important matters of constitutionality and other grounds.

Respectfully submitted,

s/ WESLEY K. BELL
WESLEY K. BELL, Pro Se and
t/a Wes Outdoor Advertising Co.
P.O. Box 538
188 Rt. 72
Manahawkin, New Jersey 08050
(609) 597-3222
Fax (609) 597-2195

# APPENDIX

**Order of the Supreme Court of New Jersey,
Filed June 4, 1997**

SUPREME COURT OF NEW JERSEY
C-1100 September Term 1996
43,994

FILED
JUN 04 1994
STEPHEN W. TOWNSEND
Clerk

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WESLEY K. BELL, etc.,
Plaintiff-Petitioner,

v.

DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Defendant-Respondent.

---

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-324-94 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 3rd day of June, 1997.

s/ STEPHEN W. TOWNSEND
CLERK OF THE SUPREME COURT

I hereby certify that the foregoing
is a true copy of the original on file
in my office.

STEPHEN W. TOWNSEND

CLERK OF THE SUPREME COURT
OF NEW JERSEY

**Decision of the Superior Court of New Jersey, Appellate Division, Filed March 17, 1997**

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-324-94T3

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

FILING DATE
APPELLATE DIVISION
MAR 17 1997
RE Domilla Fox
Clerk

WES OUTDOOR ADVERTISING CO.
RECEIVED
MAR 29 1987
DIV. OF BELL INDUSTRIES

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WESLEY K. BELL, t/a WES OUTDOOR ADVERTISING COMPANY,
Petitioner-Appellant,
v.
NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Respondent-Respondent.

---

Argued November 18, 1996—Decided MAR 17 1997

Before Judges Havey and Eichen

On appeal from New Jersey Department of Environmental Protection.

Appellant Wesley K. Bell argued *pro se*.

Alice B. Cesaretti, Deputy Attorney General, argued the cause for respondent (Peter Verniero, Attorney General, attorney; Mary C. Jacobson, Assistant Attorney General, of counsel, Barbara Conklin, Assistant Attorney General on the brief).

PER CURIAM

On March 15, 1990, the New Jersey Department of Environmental Protection (DEP) denied a coastal wetlands type A permit to Wesley K. Bell, trading as Wes Outdoor Advertising Co., Inc. (Bell), to construct two billboards on property located adjacent to Route 30 in the City of Absecon. The matter was referred to the Office of Administrative Law as a contested case for a hearing before an administrative law judge (ALJ). After several adjournments which were granted at Bell's request to allow him to comply with the DEP's discovery demands and to retain an attorney, a hearing was conducted before Administrative Law Judge Tylutki on March 9 and 10, 1994.[1] The ALJ rendered her initial decision on June 7, 1994, recommending that the DEP's denial of the permit be affirmed. Bell filed his exceptions to the ALJ's initial decision on August 14, 1994. The Commissioner of the DEP (Commissioner) affirmed the ALJ's initial decision substantially for the reasons expressed by the judge.

The ALJ determined that the burden of proving entitlement to a wetlands permit was on Bell, and concluded that Bell had failed to establish that there were no other feasible non-wetland alternative sites available for advertising billboards as required by the

[1] Bell did not retain an attorney and appeared *pro se* at the hearing. Bell did not pursue discovery from the DEP.

applicable regulations. *N.J.A.C.* 7:7E-3.25.[2] The Commissioner agreed, stating that "this finding is fully supported by the evidence in the record." Additionally, the Commissioner accepted the ALJ's conclusion that Bell had failed to show that the billboards would not have an adverse environmental impact on the wetlands. The Commissioner also stated that Bell "had provided no basis for rejecting the Initial Decision," concluding that "the Initial Decision thoroughly deals with every issue presented and required no further elaboration." Finally, the Commissioner determined that Bell was not in the proper forum to launch a challenge to the regulations as a "regulatory taking without compensation," or to the DEP's designation of his property as "wetlands."

On this appeal, Bell argues the following points:

> *Point I* - State's acts of delay and denial of use constitutes [sic] violations of both the United States and New Jersey constitutions.

---

[2] Recodified at *N.J.A.C.* 7:7E-3.27(c), effective August 20, 1990. *N.J.A.C.* 7:7E-3.25(b) then provided as follows:

> In general, development of all kinds is prohibited in wetlands, unless the Department can find that the proposed development meets the following four conditions (*see also N.J.A.C.* 7:7A-1.5 and 1.7):
>
> 1. Requires water access or is water-oriented as a central purpose of the basic function of the activity (this policy applies only to development proposed on or adjacent to waterways). This means that the use must be water dependent as defined in *N.J.A.C.* 7:7E-2.2;
>
> 2. Has no prudent or feasible alternative on a non-wetland site;
>
> 3. Will result in minimum feasible alteration or impairment of natural tidal circulation (or natural circulation in the case of non-tidal wetlands); and
>
> 4. Will result in minimum feasible alteration or impairment of natural contour or the natural vegetation of the wetlands.

*Point II* - The Wetlands Act forecloses billboards, a medium of communication, [from] entering the coastal resorts of South Jersey if they are not already in existence prior to the enactment of the Wetlands Act.

*Point III* - N.J.D.E.P. regulation requiring alternative sites is inapplicable to a property owner or a First Amendment activity on wetlands.

*Point IV* - Bell is a recognized First Amendment activity by this court and has the standing to invoke issues.

*Point V* - The burden of proof shifts in this case for Bell to obtain approval to build his billboard here.

*Point VI* - Damages should flow to appellant for regulatory taking of appellant's lands by the N.J.D.E.P.

*Point VII* - Malicious abuse of process is evident in this case and court should interpret agencies [sic] conduct as abusive.

*Point VIII* - The New Jersey Department of Environmental Protection has been applying its regulations in an unequal fashion.

*Point IX* - The administrative law judge relied on improper evidence and testimony by the State, that was both concealed from advance notice and withheld to the present.

*Point X* - Fundamental fairness is required by rules of the court, case law and the due process clause of the constitution.

Our careful review of the record persuades us that the final decision of the Commissioner should be affirmed.

We have a limited role in reviewing an agency's decision.

> [The standard is] "whether the findings made could reasonably have been reached on sufficient credible evidence present in the record," considering "the proofs as a whole," with due regard to the opportunity of the one who heard the witnesses to judge of their credibility . . . and . . . with due regard also to the agency's expertise where such expertise is a pertinent factor.
>
> [*Mayflower Securities Co., Inc. v. Bureau of Securities*, 64 *N.J.* 85, 92-93 (1973) (quoting *Close v. Kordulak Bros.*, 44 *N.J.* 589, 599 (1965)).]

Moreover, decisions of administrative agencies carry with them a presumption of reasonableness. *See City of Newark v. Natural Resources Council*, 82 *N.J.* 530, 539, *cert. denied*, 449 *U.S.* 983, 101 *S. Ct.* 400, 66 *L.Ed.*2d 245 (1980). Thus, if we find sufficient credible competent evidence in the record to support the agency's conclusion, then we will uphold the agency's findings. *See Clowes v. Terminix Int'l, Inc.*, 109 *N.J.* 575, 587 (1988) (citations omitted).

Applying these principles here, we are satisfied that the findings and conclusions of the Commissioner are amply supported by the record. Accordingly, we have no warrant to disturb them. We also conclude that Bell's contentions are clearly without merit. *R.* 2:11-3(e) (1) (D) and (E). We note only that to the extent Bell has asserted an unconstitutional taking challenge, such a claim must be timely raised in the Superior Court where a proper factual record can be developed. *See N.J.S.A.* 13:9A-6.

Affirmed.

I hereby certify that the
foregoing is a true copy of the
original on file in my office.

s/ RE DOMILLA FOX
Clerk

**Final Decision of the Department of Environmental Protection, State of New Jersey, Dated August 31, 1994**

(SEAL)

STATE OF NEW JERSEY
Department of Environmental Protection

Christine Todd Whitman
*Governor*

Robert C. Shinn, Jr.
*Commissioner*

FINAL DECISION
DOL DOCKET NO. 94-61544
AGENCY DKT. NO. 89-0728-2

WES OUTDOOR ADVERTISING CO.
RECEIVED
SEP 6 1994
DIV. OF BELL INDUSTRIES

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WESLEY K. BELL t/a WES OUTDOOR ADVERTISING COMPANY,
Petitioner,

v.

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Respondent.

---

This matter arises from a challenge to the Department's denial of a Coastal Wetlands type "A" permit to construct a billboard on property adjacent to Route 30 in Absecon. The subject lot was designated as coastal wetlands pursuant to the procedures set forth in the Coastal Wetlands Act, *N.J.S.A.* 13:9A-1 to -10. The

Initial Decision affirmed the Department's denial of the permit, finding that there are alternative non-wetlands sites available for construction of billboards in the Atlantic City area. This finding is fully supported by the evidence in the record, including the testimony of petitioner himself. In addition, the ALJ found that petitioner had failed to show that a billboard on the site would not have an adverse environmental impact.

Petitioner submitted exceptions challenging the Initial Decision. Although these exceptions were filed out-of-time (despite our Order granting a 30-day extension) they were considered prior to reaching this final decision. Petitioner has provided no basis for rejecting the Initial Decision. To the extent petitioner alleges a regulatory taking of his property, his arguments are inappropriate in this forum. To the extent petitioner alleges his property has been erroneously designated as wetlands, he has available the opportunity to request a change in designation pursuant to *N.J.S.A.* 13:9A-2 and -3.

Accordingly, I find that the Initial Decision thoroughly deals with every issue presented and requires no further elaboration. I therefore CONCLUDE that petitioner's application for a Wetlands Type "A" permit to construct a billboard on Lot 17, block 225 on the tax map of the City of Absecon is DENIED.

DATE: 8/31/94

s/ ROBERT C. SHINN, JR.
ROBERT C. SHINN, JR.
Commissioner, Department of
Environmental Protection

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Seal

**Order of Extension of the Department of Environmental Protection and Energy of the State of New Jersey, Dated July 24, 1994 by Robert C. Shinn, Jr. Commissioner**

(SEAL)

STATE OF NEW JERSEY
DEPARTMENT OF ENVIRONMENTAL
PROTECTION AND ENERGY

CHRISTINE TODD WHITMAN
*Governor*

ROBERT C. SHINN, JR.
*Commissioner*

ORDER OF EXTENSION
OAL DOCKET NO. ESA 3088-92
AGENCY DOCKET NO. 89-0728-2

Wesley K. Bell t/a West Outdoor Advertising Company, Petitioner, v. New Jersey Department of Environmental Protection and Energy, Respondent

The Initial Decision of the Administrative Law Judge was acknowledged as received by the Department of Environmental Protection (Department) on June 8, 1994. The forty-five day statutory period for review and rendering of a Final Decision expires on July 23, 1994.

By letter dated July 5, 1994 (attached) petitioner requested a thirty-day extension of time, to file exceptions to the Initial Decision. Petitioner notes that this extension is necessary because he has received "... three new court decisions which have a controlling effect on the ... matter which will cause a reversal of the Law Judges erroneous findings."

Petitioner has shown good cause why he cannot file written exceptions within the regulatory time frame.

Therefore, pursuant to *N.J.A.C.* 1:1-18.8, it is ORDERED that the time frame for filing exceptions to the Initial Decision is extended for thirty days, until July 27, 1994.

Because of petitioner's request for an extension of time to file exceptions to the Initial Decision, an extension of time must be sought from the Office of Administrative Law for the Department to review the exceptions and replies to exceptions to the Initial Decision prior to rendering a Final Decision.

The Commissioner has shown good cause why he cannot adopt, modify or reject the Initial Decision within the statutory time period. Therefore, pursuant to *N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.8, it is ORDERED that the time limit for the Commissioner to render a Final Decision is extended for forty-five days, until September 6, 1994.

DATE: 7/24/94

s/ ROBERT C. SHINN, JR.
Robert C. Shinn, Jr., Commissioner
Department of Environmental
Protection

DATE: 7/27/94

s/ JEFF D. YOSEN, Acting Orator
Jaynee LaVecchia
Director and Chief Administrative
Law Judge
Office of Administrative Law

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**Initial Decision of the Office of Administrative Law, State of New Jersey, Before Beatrice S. Tylutki, ALJ, Dated June 7, 1994**

(SEAL)
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

*INITIAL DECISION*
OAL DKT. NO. ESA 3088-92
AGENCY DKT. NO. 89-0728-2

---

WESLEY K. BELL t/a
WES OUTDOOR
ADVERTISING COMPANY,

Petitioner,

v.

NEW JERSEY DEPARTMENT
OF ENVIRONMENTAL PROTECTION
AND ENERGY,

Respondent.

---

**Wesley K. Bell**, petitioner, *pro se*

**Barbara Conklin**, Deputy Attorney General, for the respondent (Deborah T. Poritz, Attorney General of New Jersey, attorney)

Record Closed: March 10, 1994 Decided: June 7, 1994

BEFORE **BEATRICE S. TYLUTKI**, ALJ:

This matter concerns the denial by the respondent, New Jersey Department of Environmental Protection and Energy (DEPE), of the application for a Wetlands Type "A" permit, submitted by the petitioner, Wesley K. Bell t/a Wes Outdoor Advertising Company. Mr. Bell wants to construct a billboard on pilings or on a concrete pad located on a parcel of land he owns adjacent to Route 30 in the City of Absecon. This parcel has been identified as Wetlandss by the DEPE, pursuant to the Wetlands Act of 1970, *N.J.S.A.* 13:9A-1 to -10. (Act). In its letter of March 15, 1990, the respondent set forth the following reasons for its denial:

> In general, development of all kinds is prohibited in the Wetlands, unless this Department can find that the proposed development meets the following four conditions:
>
> i. Requires water access or is water oriented as a central purpose of the basic function of the activity (this policy applies only to development proposed on or adjacent to waterways).
>
> This project is not proposed on or adjacent to a waterway therefore this condition does not apply to this site.
>
> ii. Has no prudent or feasible alternative on a non-Wetlandss site.
>
> The proposed project does not need to be located in a Wetlands in order to function. Therefore an alternative on a non-Wetlands site is possible.
>
> iii. Will result in minimum feasible alteration or impairment of natural circulation.
>
> The concrete pad proposed for one of the billboards will permanently alter and impair the natural circulation of the Wetlands. The billboard which is to be supported by pilings would be a way to minimize the alteration of the tidal flow yet it still would restrict and impair the natural tidal circulation.

> iv. Will result in a minimum feasible alteration or impairment of the natural contour or the natural vegetation of the Wetlands.
>
> The construction of either type of billboard will disturb the natural vegetation of the Wetlands through filling with concrete, through shading and the depositing of debris from normal maintenance of the billboard itself.
>
> Either type of billboard will adversely affect the Wetlandss protected under the Wetlands Act of 1970 shown on the N.J. Tidal Wetlands Map Sheet #203-2046. The construction, the shading and routine maintenance from the billboards will alter the natural vegetation of the Wetlands. Since the project does not require a Wetlands location to function an alternative location on a non-Wetlands site is possible. Therefore, the construction of these billboards is prohibited under this policy. [p. 2]

The conditions set forth in this letter are substantially the same as the conditions for development in Wetlands contained in the current applicable regulation. *N.J.A.C.* 7:7E-3.27(b).

The petitioner requested a hearing and the matter was transmitted to the Office of Administrative Law on April 29, 1992, for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14B-1 to -13.

The matter was initially assigned to Administrative Law Judge John R. Tassini and Judge Tassini conducted a prehearing conference. In his prehearing order, dated August 11, 1992, Judge Tassini stated that the issues are:

> (1) Has the petitioner met his burden of proof of the following:

(i) The proposed project requires water access or is water oriented as a central purpose of the basic purpose of the project's activity?

(ii) There is no prudent or feasible alternative on a non-Wetlands site?

(iii) The project will result in minimum feasible alteration or impairment of natural circulation?

(iv) The project will result in minimum feasible alteration or impairment of the natural contour or the natural vegetation of the Wetlands?

(2) Given the above, should DEPE issue a Wetlands Type "A" permit to the petitioner?

The hearing was initially set for September 30, 1992, and Judge Tassini adjourned the hearing since the petitioner had not responded to the DEPE's interrogatories. Judge Tassini had several conferences regarding the matter and then recused himself since he learned that a friend of his was a potential witness at the hearing.

The matter was thereafter reassigned to me and I had several telephone conferences with the parties. During the conference on June 18, 1993, Mr. Bell requested time to submit a motion for summary decision based on his argument that he is entitled to an automatic approval since the DEPE did not review his application in a timely manner. The motion was not submitted within the designated time period. Mr. Bell also requested additional time in order to hire an attorney. Thereafter, I was notified by Donna Nance, Esq., that she was to be retained by the petitioner; however, this arrangement was not completed, and Mr. Bell continued to appear *pro se*. During a telephone conference on November 17, 1993, I again gave Mr. Bell an opportunity to submit the motion for summary

decision and indicated that the hearing, if still needed, would take place on March 9 and 10, 1994. Mr. Bell did not submit the motion and the hearing took place on March 9 and 10, 1994.

On the last day of the hearing, Mr. Bell asked for an adjournment so that he could arrange to have an engineer appear as a witness to testify that there are no non-Wetlands sites available for billboards. Deputy Attorney General Conklin objected to the delay and argued that Mr. Bell had ample time to prepare his case. I agreed and denied the request for an adjournment.

The record in the matter closed on March 10, 1994. At my request, the period of time for the filing of the initial decision was extended until June 9, 1994 (Order of Extension, dated April 27, 1994).

*MOTIONS PRESENTED DURING HEARING*

In his opening statement, Mr. Bell raised a number of legal arguments. Since these arguments would affect the conduct of the case, I requested Deputy Attorney General Barbara Conklin, on behalf of the DEPE, to respond and I rendered an oral decision before hearing the first witness.

The first argument of Mr. Bell's position is that the burden of proof in this matter should be on the DEPE since a billboard is a First Amendment activity, and he cited the decision in *Bell v. Stafford Twp.*, 110 *N.J.* 384 (1988). Deputy Attorney General Conklin argued that the burden of proof is on the petitioner as set forth in the prehearing order and that the holding in the *Bell v. Stafford Twp.*, case does not shift the burden of proof to the DEPE. After reviewing the decision in *Bell v. Stafford Twp.*, I agreed with Ms. Conklin's argument. In that case, the court did not discuss the burden of proof;

the court states that a legislative enactment which directly impinges on constitutionally protected rights does not have the automatic presumption in favor of its validity that is given to legislative enactments. The courts have recognized that the communicative aspects of billboards are protected under the First and Fourteenth Amendments, *Medromedia, Inc. v. San Diego,* 435 *U.S.* 490, 501, 101 *S.Ct.* 2882, 69 *L.Ed.* 2d 800, 811 (1981); *Bell v. Stafford Twp.* case. The fact that the pertinent law in this matter is not entitled to a presumption of validity as to First Amendment activities does not shift the burden of proof but only deals with the quantitative amount of proof necessary for the petitioner to prevail in this matter.

The petitioner argued that the property in issue is not all Wetlands and challenged the DEPE's designation of the property as Wetlands. Deputy Attorney General Conklin argued that the Wetlands designation is not an issue in this matter, and that there is a separate procedure available to Mr. Bell to challenge Wetlands designations. Having reviewed the prehearing order issued by Judge Tassini and my notes as to my conferences with the parties, it is clear that the parties never agreed that the issues in this matter included a challenge to the Wetlands designation. I agreed with Ms. Conklin's argument that it would be unfair to allow Mr. Bell to raise this issue for the first time on the first day of the hearing. In addition, I agreed with Deputy Attorney General Conklin's argument that the DEPE has an established procedure for Wetlands designation changes pursuant to *N.J.S.A.* 13:9A-2, and -3. I suggested to Mr. Bell that he pursue said procedure if he wishes to challenge the designation.

Further, Mr. Bell argued that he is entitled to an automatic permit since the DEPE did not review his application in a timely manner. As already stated, on two occasions Mr. Bell was given an opportunity to brief this issue and on both occasions he failed to do so. In giving him the second opportunity to brief this issue, I indicated that if I did not receive his brief within the designated time period he would waive this issue. Therefore, I **CONCLUDE** that this issue was waived and will not be considered in this initial decision.

*FACTUAL FINDINGS*

I **FIND** that the following facts are not in dispute. The petitioner has been engaged in the business of outdoor advertising since 1954 and Mr. Bell owns a number of billboards in the Atlantic City area. The property in issue was purchased at an auction from Atlantic County in 1986 for $5,100. The property in issue is designated as Lot 17, Block 225, on the tax map of the City of Absecon, and the size of the lot is approximately 200' x 100'. Since Mr. Bell purchased the property in his trade name of Wes Outdoor Advertising Co., it was clear that he intended to use the property for a billboard. Mr. Bell has been paying approximately $180 a year in real estate taxes since he purchased the property.

Mr. Bell filed an application with the Army Corps of Engineers since it was his understanding that the DEPE required the Corps' approval before an application was filed for a DEPE permit. The Corps issued a letter of no interest on March 31, 1989 (P-8). The petitioner then filed an application for a DEPE permit on June 30, 1989, stating that he wanted to construct a billboard on the property and giving two options for the construction (P-13). This application included a compliance summary

statement prepared by Pennoni Associates, Inc. (P-6). A copy of the plan was also sent to the City of Absecon, Atlantic County and the Atlantic County Planning Board, and Mr. Bell has received local approvals to construct the billboard. On March 15, 1990, the DEPE denied the petitioner's application for a permit.

Mr. Bell stated that the denial of the permit has resulted in a loss of income. Mr. Bell projected, based on another advertising contract, that a billboard on the property in issue could be rented for between $9,000 and $12,000 a month.

The first factual dispute deals with whether there is an alternative non-wetlands site for the billboard. Mr. Bell stated that he is in the business of constructing billboards and renting the advertisement space on said billboards and therefore he is always trying to acquire additional property for this purpose. Mr. Bell stated that he is not aware of any alternative sites on Route 30 since there is only limited space available due to the highway department's spacing requirement for billboards. Mr. Bell stated that he has considered leasing property but prefers to purchase the property. Mr. Bell presented no witnesses or documents to support his position that there are no alternative sites for billboards on Route 30 or in the vicinity. Mr. Bell indicated that since he purchased the property in issue, he has purchased other property for billboards (P-45 and P-46) and he presently has pending with the DEPE an application to build a billboard along the Atlantic City Expressway. Since there is a demand for billboard advertisements in the Atlantic City area, Mr. Bell would like to purchase and construct many more billboards.

Karl Braun, on behalf of the DEPE, testified that there are many alternative non-Wetlands sites for billboards in the Atlantic City area, and noted that a

number of billboards were constructed in the Atlantic City area between 1992-94 (R-4). Additionally, there are a substantial number of billboard permit applications now pending before the DEPE (R-4).

During the hearing there was a discussion of the Gateway site owned by the R.C. Maxwell Company. In 1993, this company was given approval to construct five billboards along the Atlantic City Expressway. Prior to the submission of the permits to build the billboards, R.C. Maxwell Company requested that the property for the billboard be reconsidered and no longer classified as Wetlands. The DEPE agreed to the reclassification since the property along the Atlantic City Expressway had been filled with spoilage (highway construction debris) and was no longer wetlands.

The second factual dispute deals with whether the proposed billboard on the property in issue would have any detrimental effects on the wetlands. Based on his years of experience in the billboard business, Mr. Bell stated that the construction of a billboard on wetlands will not have any detrimental effects. After the billboard is built and the advertisement is placed on the billboard, Mr. Bell's employees rarely have to go onto the site except for the periodic changing of light bulbs. Mr. Bell stated that he cleans up his properties and does not allow building material debris to remain on the site either after the initial construction or after any repair work that might have to be done on the property.

Mr. Bell stated that shading caused by the billboard does not adversely affect the surrounding vegetation since it exists only for a short period of time, approximately one hour a day on sunny days. Further, Mr. Bell stated that billboards do not have any affect on water circulation especially where the billboards are built on pilings.

Mr. Braun testified that permits to build billboards in wetlands have been rejected since they do not have an adverse effect on water circulation and vegetation. Mr. Braun stated that the effect on vegetation varies depending on the type of vegetation in the area, and the height and shape of the billboard. Also, Mr. Braun stated that the base for the billboard will affect water circulation, and that, in time, this will also affect the vegetation. Mr. Braun stated that a billboard constructed on a concrete pad (one of the two proposals contained in Mr. Bell's application for a DEPE permit) would have a greater impact on the vegetation and water circulation since a larger area would be used to support the billboard. Although billboards built on pilings disturb a smaller area, Mr. Braun stated that the soil removed for the pilings are usually left on the site and can effect the environment.

Additionally, Mr. Braun stated that normally a lot of debris accumulates around a billboard as a result of construction, storms and normal water circulation, and he presented several photographs showing such debris (R-4, R-5, R-6, R-7). Mr. Bell disagreed and presented a number of photographs showing billboards without any debris beneath them (P-15, 16, 17, 18, 29, 34, 36, 42, 44). A number of these photographs show billboards in water and as pointed out by Deputy Attorney General Conklin it is impossible to tell if there would have been any debris once the water receded.

Mr. Braun admitted that billboards do not have a substantial effect on wetlands.

During the hearing, Mr. Bell on several occasions renewed his argument that the entire property in issue is not wetlands and argued that the portion of the property that has an elevation of three feet and above is not

wetlands (See P-7). During the hearing, Mr. Braun questioned the accuracy of the elevation designation on the map submitted by Mr. Bell. Also, on behalf of the DEPE, Virginia Kop'Kash testified that she is familiar with the permit application filed by Mr. Bell and that the entire parcel has been designated as wetlands as shown on Tidal Wetlands Map, Sheet #203-2046 (R-11, R-1). Since I already ruled that the wetlands designation is not an issue in this matter, I will not render a decision as to the issue.

*ARGUMENTS OF THE PARTIES*

On behalf of the DEPE, Ms. Conklin argued that the petitioner had not shown that there are no alternative non-wetlands sites available. Ms. Conklin noted that Mr. Bell presented no witnesses or documents to show that alternative sites were not available and relied only on his own impression as to the availability of sites. Ms. Conklin noted that Mr. Bell admitted that he has purchased additional properties and has built billboards since he acquired the property in issue and that other companies have also constructed billboards or are applying for permits to construct billboards in the Atlantic City area. Ms. Conklin argued that there is no legal basis for Mr. Bell's position that the alternative site has to be located on Route 30 and it has to be a parcel of property that he can afford to purchase.

In addition, Ms. Conklin argued that billboards have an affect on wetlands since there is an alteration of the contour of the land and of water circulation, as well as partial shading. Ms. Conklin argued that Mr. Bell has presented only his opinion as to the environmental impact of a billboard and has not presented an expert witness to testify that there would be no adverse

environmental impact. Also, Ms. Conklin argued that Mr. Bell purchased the property knowing that he had to get a DEPE permit to construct the billboard. Further, Ms. Conklin argued that the allegation of taking without compensation must be filed in the New Jersey Superior Court, pursuant to *N.J.S.A.* 13:9A-6.

In closing, Mr. Bell argued that an alternative non-wetlands site is not available. He argued that he is in the business of constructing billboards and that the properties he acquired after the property in issue should not be considered to be alternative sites. Mr. Bell argued there are no guidelines to define what are alternative sites. Mr. Bell argued that an alternative site exists only if it is available for purchase at a reasonable price and he can get a customer for an advertisement on said site. Mr. Bell argued that there is no other use for the property in issue and that the denial of his application for a permit is equivalent to a taking of the property without compensation. Further, Mr. Bell argued that the construction of the billboard on the property in issue would have only a minimal affect on the wetlands and cited the decision of the administrative law judge in *Wesley Bell t/a Wes Outdoor Advertising v. Division of Coastal Resources, Department of Environmental Protection,* ESA 3531-83 (June 20, 1984), *adopted,* Commissioner, Department of Environmental Protection (August 2, 1984), *affirmed,* No. A-1074-84T6 (App. Div. October 22, 1985). In addition, Mr. Bell argued that the regulation (*N.J.A.C.* 7:7E-3.27(b)) goes beyond the statutory authorization and questioned the legality of the regulation. Mr. Bell argued that pursuant to the statute a permit should be given if the construction in the wetlands has only a minimal affect on the wetlands. Mr. Bell argued that the DEPE is biased against him

because of the court cases he has initiated against the Department. Lastly, Mr. Bell renewed all of the arguments he made on the first day of the hearing.

*CONCLUSIONS*

I agree with Deputy Attorney General Conklin's argument that the petitioner has now shown that there are no alternative non-wetlands sites. Mr. Bell and other billboard companies have been able to acquire other sites in the Atlantic City area. Also, I disagree with Mr. Bell's argument that the alternative site must be on Route 30 and must be affordable.

Although, as stated by Mr. Bell, the DEPE has no written standards as to what constitutes an "alternative site", there are administrative decisions dealing with this term. In the case of *In re Bridgeton Bulk Materials Handling Facility,* 93 *N.J.A.R.* 2d (Vol. 5) 203 (DEPE), *adopted,* Acting Commissioner, Div. of Envt'l Protection and Energy (July 26, 1993), the petitioners sought a wetlands permit to build a new port along New Jersey's coastal zone. In that case, the administrative law judge concluded that the petitioners were not entitled to the wetlands permit because they failed to demonstrate there was no feasible alternative non-wetlands site. The administrative law judge stated that the issue is "whether there is an alternative *site* which is non-wetlands, not whether there is no alternative but to disturb some wetlands on a site which otherwise meets all applicable conditions." *Id.* at 212. In that case, the administrative law judge rejected the petitioners' argument that there was no need to consider a feasible alternative site since the amount of wetlands to be disturbed was quite small.

In the *Bell v. Div. of Coastal Resources, Dept. of Environmental Protection* case, the administrative law judge held that:

> there does not have to be an *equivalent* non-wetlands site available which would furnish a comparable economic return in order for there to [be] an alternative which is prudent or feasible under the Wetlands regulations.*[*Id.* at 32].

In reaching this conclusion the administrative law judge noted that 49 *U.S.C.A.* §1653(f), the Department of Transportation Act of 1960, contains a similar standard, and that in discussing the meaning of this standard, the U.S. Court of Appeals for the Ninth Circuit in *Brooks v. Coleman*, 518 *F.*2d 17 (9th Cir. 1975), stated:

> In its consideration of the Secretary's determination, the trial court drew upon *Overton Park's* definition of "feasible and prudent alternative": parklands may be "used" for highway purposes only if "there are truly unique factors present in the case," if "feasible alternative Routes involve uniquely difficult problems," or if "the cost or community disruption resulting from alternative Routes [reach] extraordinary magnitudes." [*Id.* at 413, 416, 91 *S. Ct.* at 822] (Bell at 33)

The administrative law judge in the *Bell v. Div. of Coastal Resources, Dept. of Environmental Protection* case, concluded that the standard of no feasible and prudent alternatives should be strictly construed and the fact that the intended site would be more profitable than alternative sites or the fact that an alternative site may be outside the intended area does not justify the use of the intended site.

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* At the time of the initial decision the applicable regulation was *N.J.A.C.* 7:7A-1.5(a). The current regulation is *N.J.A.C.* 7:7E-3.27(b).

Also in the *Bell v. Div. of Coastal Resources, Dept. of Environmental Protection* case, the administrative law judge stated that in evaluating the feasibility and prudency of an alternative site, the DEPE has to examine the proposed use for the site and its relationship to wetlands, and the judge found that the billboards the petitioner intended to erect on wetlands had no relationship to the wetlands "other than that these lands happen to be adjoining a densely traveled road," and that

> the regulations were not designed to create a situation in which an applicant who wants to construct on wetlands might be permitted to do so merely because he has no equivalent alternative that would provide him with the same commercial gain. [*Id.* at 34]

The testimony during the hearing clearly shows that there are alternative sites and I agree with the deputy attorney general's argument that such an alternative site is not limited to land adjacent to Route 30. Therefore, I **CONCLUDE** that the petitioner has failed to meet the condition for a permit that there is no feasible alternative non-wetland sites.

Also, I agree with Deputy Attorney General Conklin's argument that the petitioner has not shown that a billboard on the property in issue would not have an adverse environmental impact. Mr. Bell relied on his own opinion as well as the decision in the *Bell* case. In the *Bell* case there was an expert who testified as to the comparable value of the wetlands in issue in that case and the effect of the specific billboards on the sites. The conclusion of the administrative law judge in the *Bell v. Div. of Coastal Resources, Dept. of Environmental Protection* case that the billboards would have a *de minimis* affect on the wetlands is limited to the property

in issue in that case and does not mean that a billboard in another wetlands area or another type of billboard would also have only a *de minimis* affect on the wetlands. Even though Mr. Braun admitted that billboards in general do not have a substantial effect on wetlands, I **CONCLUDE** that Mr. Bell has not shown that the billboard proposed in this matter would not have an adverse affect on the wetlands.

Mr. Bell raised the issues of the constitutionality of the Act as applicable to billboards, and the taking of the property without compensation in order to preserve the arguments and he recognized that these issues will have to be presented to the New Jersey Superior Court.

As to Mr. Bell's argument that *N.J.A.C.* 7:7E-3.27(b) exceeds the authorization given to the DEPE by the Act, I **CONCLUDE** that Mr. Bell presented no legal basis for his position.

Also as to Mr. Bell's argument that the DEPE is biased against him, I **CONCLUDE** that Mr. Bell presented no facts to support this argument other then the fact that he has initiated several cases against the Department. Mr. Bell is not the only person or corporation to have filed several court cases against the DEPE and in the absence of any specific proof of bias, I **CONCLUDE** that the DEPE's denial was not the result of bias.

Therefore, I **CONCLUDE** that the petitioner has not shown that his application meets the standards set forth in *N.J.A.C.* 7:7E-3.27(b) for a permit, and I **ORDER** that the decision of the DEPE to deny the permit application be **AFFIRMED.**

I hereby **FILE** my initial decision with the **DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ENERGY** for consideration.

This recommended decision may be adopted, modified or rejected by the **DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ENERGY**, which by law is authorized to make a final decision in this matter. If the Department of Environmental Protection and Energy does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, OFFICE OF LEGAL AFFAIRS, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ENERGY, 401 East State Street, 4th Floor, West Wing, CN 402, Trenton, New Jersey 08625-0402**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 7, 1994 s/ BEATRICE S. TYLUTKI
DATE BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

June 8, 1994 s/ (ILLEGIBLE)
DATE DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ENERGY

Mailed to Parties:

JUN 14 1994 s/ JAYNEE LaVECCHIO
DATE OFFICE OF ADMINISTRATIVE LAW

cad

**Denial of Wetlands Approval of the Department of Environmental Protection, State of New Jersey, No. 89-0728-2, Dated March 15, 1990**

Let's protect our earth
(SEAL)

STATE OF NEW JERSEY
DEPARTMENT OF ENVIRONMENTAL PROTECTION
TRENTON

DIVISION OF COASTAL RESOURCES

PLEASE ADDRESS REPLY TO:
CN 401
TRENTON, N.J. 08625

March 15, 1990

Wesley K. Bell
P.O. Box 538
Manahawkin, N.J. 08050

RE: Wetlands Type "A" Permit
#89-0728-2
Wesley K. Bell
City of Absecon, Atlantic County

Dear Mr. Bell:

Please be advised that the Division acting under the Wetlands Act of 1970 (N.J.S.A. 13:9A-1) and New Jersey's Rules on Coastal Resources and Development (N.J.A.C. 7:7E-1.1 et. seq.) has decided not to grant the Wetlands Type "A" Permit requested by the applicant. The reasons for this denial are listed below.

*Proposed Project*

The applicant proposes the construction of either a billboard placed on pilings or a billboard constructed on a concrete pad in the City of Absecon, Atlantic County. Work is as shown on plans submitted to the Department of Environmental Protection Division of Coastal Resources on August 28, 1989.

*Analysis*

The following analysis is based upon New Jersey's Rules on Coastal Resources and development (N.J.A.C. 7:7E-1.1 et seq.) effective September 26, 1980 as revised to August 15, 1988. The analysis will refer to appropriate Rules by Administrative Code Sections.

*Special Areas*

Special Areas are those 45 types of coastal areas which merit focused attention and special management policies.

*Wetlands* (7:7E-3.25)

Wetlands are also areas where the substrate is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Under CAFRA, the Department regulates freshwater wetlands and forested wetlands such as white cedar stands, hardwood swamps and other lowland forest types on sites proposed for the major developments requiring a CAFRA permit.

In general, development of all kinds is prohibited in wetlands, unless this Department can find that the proposed development meets the following four conditions:

i Requires water access or is water oriented as a central purpose of the basic function of the activity (this policy applies only to development proposed on or adjacent to waterways).

This project is not proposed on or adjacent to a waterway therefore this condition does not apply to this site.

ii Has no prudent or feasible alternative on a non-wetlands site.

The proposed project does not need to be located in a wetlands in order to function. Therefore an alternative on a non-wetland site is possible.

iii Will result in minimum feasible alteration or impairment of natural circulation.

The concrete pad proposed for one of the billboards will permanently alter and impair the natural circulation of the wetlands. The billboard which is to be supported by pilings would be a way to minimize the alteration of the tidal flow yet it still would restrict and impair the natural tidal circulation.

iv Will result in minimum feasible alteration or impairment of the natural contour or the natural vegetation of the wetlands.

The construction of either type of billboard will disturb the natural vegetation of the wetlands through filling with concrete, through shading and the depositing of debris from normal maintenance of the billboard itself.

Either type of billboard will adversely affect the wetlands protected under the Wetlands Act of 1970 shown on the N. J. Tidal Wetlands Map Sheet #203-2046. The construction, the shading and routine maintenance from the billboards will alter the natural vegetation of the wetlands. Since the project does not require a

wetlands location to function an alternative location on a non-wetland site is possible. Therefore, the construction of these billboards is prohibited under this policy.

If you consider yourself aggrieved by this action you may, within 10 days of publication of notice of this decision in the *DEP Bulletin* request a hearing by addressing a written request to the Commissioner, Department of Environmental Protection, CN 401, Trenton, New Jersey 08625.

The notice of request for a hearing on appeal shall include the appropriate agency project number and when the appeal is taken by someone other than the applicant, evidence that a copy of the request has been mailed to the applicant.

The appellant shall, within 14 days of the date on which the initial hearing request was postmarked, submit an additional statement describing, in detail, how that person is aggrieved by the decision, and which findings of fact and conclusions of law are being challenged.

Sincerely,

s/ RUTH EHINGER
Ruth Ehinger, Chief
Bureau of Coastal Regulation

c:
Bureau of Enforcement
Atlantic County Planning Board
Absecon Planning Board
Virginia KopKash

*New Jersey Is An Equal Opportunity Employer*

1-609-292-0060
5-4-90 2:45 PM to 3:12 PM

**Letter From Department of the Army**
**Philadelphia District, Corps of Engineers**
**Dated March 31, 1989**

(SEAL)

DEPARTMENT OF THE ARMY
PHILADELPHIA DISTRICT, CORPS OF ENGINEERS
CUSTOM HOUSE—2 D & CHESTNUT STREETS
PHILADELPHIA, PENNSYLVANIA 19106-2991

MAR 31 1989

REPLY TO
ATTENTION OF

Regulatory Branch

SUBJECT: CENAP-OP-R-88-1125 (NJD)

Mr. Wesley K. Bell
WES Outdoor Advertising Company
P.O. Box 538
Manahawkin, New Jersey 08050

Dear Mr. Bell:

Reference is made to your application to construct a billboard at the southwest corner of Delilah Road and New Jersey State Route 30, lot 17, block 225, Absecon, Atlantic County, New Jersey.

Under current Federal regulations, a Department of the Army permit is required for work or structures in navigable waters of the United States and/or the discharge of dredged or fill material into waters of the United States including their adjacent wetlands.

Based on the information you have provided, it has been determined that the proposed work will not require the formal approval of this office. Should you have any further questions, please contact Mrs. Mary Hamilton of this office at (215) 597-2812.

Sincerely,

s/ FRANK J. CIANFRANI
Frank J. Cianfrani
Chief Regulatory Branch

**Relevant Portions of the United States Constitution.**

## ARTICLE III

* * *

*Section* 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

*Section 3.* Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

* * *

## AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

### Amendment 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * *

### Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any

criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * *

## Amendment XIV

*Section 1.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *